200.10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

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JON H. HAMMER,

Plaintiff,

-against-

THE AMERICAN KENNEL CLUB, INC. and THE BRITTANY CLUB OF AMERICA a/k/a THE AMERICAN BRITTANY CLUB, INC.,

Defendants.

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DECISION/ORDER
Index No. 600029/00

Motion Seq. Nos. 001, 002, and 003

BARBARA R. KAPNICK, J.:

Motions Sequence Numbers 001, 002 and 003 are consolidated for disposition.

Plaintiff Jon H. Hammer is the owner of an unspayed female Brittany (known as "Ms. Dale's Spooner") duly licensed by the State of New York and registered with The American Kennel Club ("AKC") under No. SN663733/07. The tail of plaintiff's Brittany, which is in its natural, undocked state, measures approximately 9¼ inches in length.

This action concerns the standard published in The Complete Dog Book, an Official Publication of the American Kennel Club in 1929 and republished in 1997 (19th edition) with respect to the Brittany (also known as Brittany spaniel) breed which provides:

> Any tail substantially more than four inches shall be severely penalized.

The AKC standards, which are recommended by the parent breed club (in this case, the American Brittany Club) and approved by the AKC's board of directors, are mandated for AKC shows, including the annual Westminster Kennel Club show held annually in New York City and are used by AKC judges at all the various AKC specialty and all-breed shows.

Plaintiff contends that the effect of this tail standard is to preclude a Brittany, such as plaintiff's dog, with a so-called undocked tail, from qualifying or effectively competing in Brittany specialty shows and in the Brittany showing of all-breed shows.[1]

There is no dispute that owners wishing to enter their Brittanys in these competitions routinely cause their dogs to undergo a tail docking (i.e., cutting/amputation) procedure.

The American Veterinary Medical Association recently concluded that tail docking procedures provide no benefit to the dog and cause pain and distress, and, as with all surgical procedures, are accompanied by inherent risks of anesthesia,[2] blood loss and infection. The practice has been completely banned or severely

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[1] Defendants indicate that some Brittanys may naturally meet the tail standard without any docking, although there is no dispute that most strains of Brittanys are born with full-length tails.

[2] The procedure is, however, customarily performed without the use of anesthesia, causing extreme pain and injur the canine patient.

restricted in Sweden, Finland, Denmark, the United Kingdom and Germany.

Plaintiff, an attorney appearing pro se, seeks a declaratory judgment declaring that the AKC standards pertaining to tails be declared null and void and in derogation of law - specifically, Agriculture and Markets Law § 353-a - and preliminarily and permanently enjoining AKC from applying, enforcing or utilizing the standard pertaining to Brittany tails.

Defendant AKC now moves for an order: *(i)* denying plaintiff's request for declaratory and injunctive relief and dismissing the complaint in its entirety on the grounds that plaintiff lacks standing to assert the claims pursuant to Section 353-a and that the complaint fails to establish a justiciable controversy appropriate for declaratory relief; and *(ii)* dismissing the complaint in its entirety on the ground that plaintiff has failed to state a cause of action upon which relief may be granted. (Motion Sequence No. 01).

In addition, defendant American Brittany Club, Inc. (the "Brittany Club") moves for an order dismissing plaintiff's complaint on the grounds that this Court lacks long-arm jurisdiction under CPLR §§ 301 and 302 and that service of process was improper, as well as for the reasons set forth in co-defendant AKC's motion. (Motion Sequence No. 02).

Finally, In Defense of Animals ("IDA"), a national non-profit animal advocacy organization, moves (Motion Sequence No. 03) for leave to appear as *amicus curiae* in this action, and submits a proposed memorandum of law in which it argues that tail amputation, carried out solely for cosmetic purposes, constitutes cruelty in violation of Agriculture and Markets Law § 353 (as opposed to § 353-a, the felony section, which forms the basis of plaintiff's complaint), and that the defendants AKC and the Brittany Club are furthering acts of cruelty in violation of §353 by promoting the practice of tail docking.

The motion by IDA for leave to appear as *amicus curiae* in this action is granted to the extent of permitting IDA to provide new information and relevant argument to the Court with respect to the pending motions. See, Kemp v. Rubin, 187 Misc 707 (Sup. Ct., Queens Co. 1946); Colmes v. Fisher, 151 Misc. 222 (Sup. Ct., Erie Co. 1934). The Court notes that IDA has represented that it does not intend to participate in this action beyond the instant application.

Agriculture and Markets Law § 353-a provides, in relevant part, that:

> 1. A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty. For purposes of this section, "aggravated cruelty" shall mean conduct which: (i) is intended to

cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.

* * *

3. Aggravated cruelty to animals is a felony. A defendant convicted of this offense shall be sentenced pursuant to paragraph (b) of subdivision one of section 55.10 of the penal law provided, however, that any term of imprisonment imposed for violation of this section shall be a definite sentence, which may not exceed two years.[3]

Plaintiff, however, now concedes that his reference in the complaint to Section 353-a was erroneous. Rather, plaintiff contends that the applicable statute is Agriculture and Markets Law § 353, which provides, in relevant part, that

> A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by

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[3] "The purpose of the statute was to provide stricter penalties for the most egregious animal abuse cases (Memorandum in Support, New York State Assembly A - 755). The law, known as "Buster's Law', was named after a Schenectady cat that was doused with kerosine and set on fire. It was also noted in the governor's message that such egregious animal abuse was not isolated since other defenseless animals had been thrown from windows, used for target practice, and subjected to hangings and starvation (Governor's Message A.341)." People v. Knowles, 184 Misc.2d 474, 476 (County Ct, Rensselaer Co. 2000).

imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both. [emphasis added].

"Torture" or "cruelty" is defined by Section 350 as "every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted."[4]

Defendant the Brittany Club moves for an order dismissing plaintiff's complaint on the grounds that this Court lacks long-arm jurisdiction under either CPLR § 301 or § 302 since the American Brittany Club, Inc., a foreign corporation, a) is not doing any business in the State of New York; b) is not registered or otherwise authorized to do business in New York; c) has no offices in New York; d) neither owns nor leases any real property in New York; e) has no bank accounts in New York; f) has no agents or representatives in New York; g) pays no taxes in New York; and h) has "minimal" contacts with New York since only 3.5% of its membership, or 108 out of its 3,100 members, reside in New York.

In addition, defendant the Brittany Club argues that there is no common ownership between defendant and three local clubs -- i.e., the Long Island American Brittany Club, the Hudson Valley American Brittany Club and the Upper New York American Brittany

[4] This Court has reviewed the determination of another court that the act of docking a dog's tail is a common practice that is not proscribed by section 353 (see, People v. Rogers, 183 Misc. 2d 538 [City Ct., Watertown 2000]), although that decision is not binding on this Court.

Club -- which are located in New York State, and which have their own officers and staff members.

Defendant the American Brittany Club further contends that the local Brittany clubs, which maintain their own bank accounts, are, for the most part, financially independent of the American Brittany Club. Moreover, defendant claims that it has no power over the selection of the executive officers of each club, and does not exercise any control over the marketing and operational policies of the local clubs, which are free to create their own internal rules and by-laws.

However, it is undisputed that defendant American Brittany Club's brochure states that the Club "is composed of many regional or local clubs located from coast to coast." In addition, this defendant concedes that each member pays an annual $25 membership fee, only $9 of which is retained by the local club. The remaining $16 from each membership fee is forwarded to the American Brittany Club.

New York courts may exercise jurisdiction over a foreign corporation where the corporation "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state." CPLR §302(a)(3)(i).

Inasmuch as defendant American Brittany Club regularly derives substantial fees from New York State, there is a sufficient basis for this Court to exercise jurisdiction over said defendant. See, Laufer v. Ostrow, 55 N.Y.2d 305 (1982).

Defendant Brittany Club also moves to dismiss plaintiff's complaint on the grounds that service of process by certified mail (without an acknowledgment of receipt form, as required by CPLR §312-a[d]) was defective, and that service of process upon AKC did not constitute proper service upon the American Brittany Club.

Plaintiff does not dispute that service was not properly made in the first instance but claims to have re-served defendant Brittany Club by service upon Nancy Morabito, Hudson Valley Regional Club Secretary on March 8, 2000.

However, plaintiff has made no showing that the regional secretary is authorized to accept service on behalf of the national organization. See, e.g., Dominguez v. National Airlines, 42 F.R.D. 35 (S.D.N.Y. 1966).

Service upon defendant American Brittany Club was, therefore, defective, and plaintiff's complaint against it must be dismissed.

This Court thus turns its attention to the motion by defendant AKC for an order denying plaintiff's request for declaratory and injunctive relief and dismissing the complaint in its entirety.

Defendant AKC argues that plaintiff, a private citizen, lacks standing to assert claims under Section 353, which manifestly vests its enforcement with the law enforcement branch of government or with specific societies incorporated for the purpose of preventing cruelty to animals and does not expressly provide a private right of action. Defendant AKC further argues that it would be inconsistent with the statutory enforcement scheme set forth in the statute to imply a private right of action in favor of plaintiff. See, Carrier v. Salvation Army, 88 N.Y.2d 298, 304 (1996).

The test of whether a private action may be implied involves three factors: "'(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme' (citation omitted)" Carrier v. Salvation Army, supra at 302.

The party pursuing the private right of action bears the burden of meeting that test. See, Larson v. Albany Medical Center, 173 Misc.2d 508 (Sup. Ct., Albany Co. 1997), aff'd as modified, 252 A.D.2d 936 (1998).

However, in the instant case, plaintiff does not seek to enforce any private rights under the statute nor does plaintiff seek to recover any damages or attorney's fees. Rather, plaintiff merely seeks a declaration with respect to the applicability of a criminal statute under which he could be subject to prosecution if he arranged to have his Brittany's tail docked in preparation for entering the animal in an AKC-sponsored competition.

Defendant AKC also moves to dismiss the complaint on the ground that it fails to establish a justiciable controversy appropriate for declaratory relief. Specifically, defendant AKC argues that plaintiff has failed to allege -- and cannot allege -- that he has entered his Brittany in a conformation show and that his dog was disqualified on account of the length of her tail.

Plaintiff concedes that his Brittany has not competed in any AKC breed shows since she was only six months of age at the commencement of this action and is not yet of suitable age for effective showing. However, plaintiff is nonetheless an aggrieved party since for several months he has requested that defendants modify the existing standard and they have refused.

Defendant AKC also contends that even if plaintiff has standing to enforce §353, plaintiff has failed to state a claim for violating of the statute as against AKC since it does not perform the docking procedure.

Defendant next argues that the declaratory and injunctive relief sought by plaintiff essentially would require the Court to make an aesthetic judgment as to the appearance of Brittanys, a subject in which the Court has no expertise. Defendant further argues that the Court should be reluctant to become involved in defendant's internal affairs. (See, e.g., Thornton v. American Kennel Club, 182 A.D.2d 358 (1st Dep't 1992).

However, the Court is not being asked to inject itself into the management of AKC's internal affairs but merely to rule on the legality of a widespread practice which appears to be attributable, in large part, to the AKC tail standard.

Finally, defendant AKC argues that plaintiff has no legally protectible interest in entering the Brittany in, or winning, an AKC-sanctioned dog show.

Plaintiff, on the other hand, contends that the Brittany standard "discriminates" against him and others similarly situated and is 'arbitrary and capricious' since there is no penalty tail provision with respect to other breeds, such as the English setter.

Plaintiff's complaint, however, fails to sufficiently set forth these allegations.

Accordingly, based on all the papers submitted and the oral argument held on the record on June 28, 2000, the motion by the American Kennel Club, Inc. and the motion by the American Brittany Club, Inc. for an order dismissing the complaint are granted.

Plaintiff is, however, granted leave to effectuate proper service upon the defendants, within 30 days of service of a copy of this order with notice of entry, of a re-plead complaint which more fully and specifically sets forth plaintiff's allegations of 'discriminatory' and 'arbitrary and capricious' actions on the part of the defendants.

This constitutes the decision and order of this Court.

Dated: January 4, 2001

BARBARA R. KAPNICK
J.S.C.

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